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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner,
v.
KAISER ALUMINUM & CHEMICAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

BRIEF FOR KAISER ALUMINUM & CHEMICAL CORPORATION IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Argument	7
I. It is Within Authority of a United States Court of Appeals to Overturn Factual Findings and Conclusions of a District Court When the Judgment Is Not Supported by Substantial Evidence	7
II. The Court of Appeals' Holding Followed Established Precedents; Therefore, the Only Issue Is Whether Respondent's Evidence Satisfied the "Delivery Requirement". The United States Supreme Court Should Not Be Required to Review the Court of Appeals' Application of the Uncontroverted Facts to the Established Law	8
Conclusion	12

CITATIONS

Cases

Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island and Pacific Railroad Co., 311 F.2d 493 (7th Cir. 1963)	9

Blue Bird Food Products Co. v. Baltimore & Ohio Railroad Co., 492 F.2d 1329 (3rd Cir. 1974) 9

Clark v. Barnwell, 53 U.S. 272, 12 How. 272 (1851) 9

Continental Grain Co. v. American Commercial Barge Line Co., 332 F.2d 26 (7th Cir. 1964) 9

Cutten v. Allied Van Lines, Inc., 514 F.2d 1196 (9th Cir. 1975) 9

Ed Miniat, Inc. v. Baltimore and Ohio Railroad Co., 587 F.2d 1277 (D.C. Cir. 1978) 9

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 313 F.2d 864 (7th Cir. 1963) 9

Hoover Motor Express Co. v. United States, 262 F.2d 832 (6th Cir. 1959) 8

Horn v. Cia de Navegacion Fruco, 404 F.2d 422 (5th Cir. 1968) 9

Kaiser Aluminum & Chemical Corporation v. Illinois Central Gulf Railroad Company, 468 F.Supp. 615 (E.D. Mo. 1979) 2,6

Kaiser Aluminum & Chemical Corporation v. Illinois Central Gulf Railroad Company, 615 F.2d 470 (8th Cir. 1980) 1,6

Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 84 S.Ct. 1142 (1964) 5,8,12

Ohio Galvanizing & Manufacturing Company v. Southern Pacific Company, 39 F.2d 840 (6th Cir. 1979) 9

Southern Illinois Stone Company v. University Engineering Corporation, 592 F.2d 446 (8th Cir. 1979) 7

The Maersk, 91 F.2d 932 (2nd Cir. 1937) 9

Tuschman v. Pennsylvania R.R., 230 F.2d 787 (3rd Cir. 1956) 9,11

Statutes

28 U.S.C. Section 1245(1) 2

49 U.S.C. Section 20(11) (Revised and Codified, October 17, 1978, as 49 U.S.C. Section 11707) 2,3,5

49 U.S.C. Section 101 11

Rules

Federal Rule of Civil Procedure 52(a) 7

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BRIEF FOR KAISER ALUMINUM & CHEMICAL CORPORATION IN OPPOSITION

The respondent, Kaiser Aluminum & Chemical Corporation ("Kaiser") respectfully prays this Court deny the Illinois Central Gulf Railroad Company's ("ICG") petition requesting that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A-12 to A-27) is reported at 615 F.2d 470. The opinion of the United States District Court for the

Eastern District of Missouri (Pet. App. A-2 to A-11) is reported at 468 F.Supp. 615. Unless otherwise designated, citations will be to the appendix filed in the Court of Appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 4, 1980. The ICG's Petition for a Rehearing En Banc was denied on March 5, 1980. The ICG's petition for a Writ of Certiorari was filed within ninety days of the denial. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals properly apply the established case law to the uncontroverted facts when it determined that Kaiser had proved a prima facie case of "delivery" under the Carmack Amendment?

STATUTORY PROVISIONS INVOLVED

The United States Code, Title 49:

> Section 20(11). Any common carrier . . . subject to the provisions of this chapter receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States . . . and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad . . . from the liability imposed; and any such common carrier, railroad . . . so receiving property for transportation from a point in one State . . . to a

> point in another State . . . shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it . . .
>
> (Revised and Codified, October 17, 1978 as 49 U.S.C. Section 11707.)

STATEMENT OF THE CASE

Kaiser Refractories, a division of Kaiser Aluminum & Chemical Corporation, manufactures refractory products as its facility in Mexico, Missouri. Refractory products are used by industry to contain high temperatures. For instance, refractory products are used to line steel blast furnaces. Some refractory products can withstand temperatures up to 3000 degrees Fahrenheit. An important component of some refractory products is calcined refractory grade bauxite. ("RASC bauxite") This grade of bauxite is produced in South America by the Guyana Bauxite Company, Ltd.

Kaiser placed its purchase orders for RASC bauxite through the mining company's agent, Philipp Brothers.

RASC bauxite is easily contaminated. (A.-272, 438, 441)

By a letter dated April 30, 1975, Phillipp Brothers requested the ICG to furnish clean railcars, free of contaminants, to transport RASC bauxite due at the Alabama State Docks in Mobile, Alabama on or about May 15, 1975. (Kaiser Exhibit 7, A-260) The M/V Arrow Cane carrying 16,000 metric tons of RASC bauxite arrived at the Alabama State Docks on May 25, 1975. (A.-311) Prior to unloading the Arrow Cane, employees of the Alabama State Docks cleaned and washed the entire unloading system. (A.-307, 308, 386, 391, 422, 425) Mr. Stanley Malabud, an employee of Philipp Brothers, inspected the cargo and found it to be clean. (A.-273) He also inspected the covered

hopper cars provided by the ICG. He rejected five to ten of the railcars because they were not clean. (A.-276) The ICG did not provide a sufficient number of railcars to unload the Arrow Cane. Consequently, part of the RASC bauxite was stored at the Alabama State Docks. (A.-278) Mr. Malabud inspected the pad and found it to be free and clean of contaminants. (A.-279-280) After it was placed on the pad, the RASC bauxite was covered with a plastic sheeting. (A.-280) There were no other products or minerals within 200 feet of the stored RASC bauxite. (A.-388, 406) At this time, the Alabama State Docks did not handle or store sulfides, leached carbonates, rock fragments, silicates, quartz, ballast rock or limestone. (A.-389, 390)

On May 30, 1975 and June 3, 1975 the ICG provided 13 open top hopper cars to transport the stored RASC bauxite. (A.-317, 318, 332) The bauxite was placed in these cars with a front end loader which was cleaned before it transported the bauxite. (A.-22)

The ICG issued a Bill of Lading for this cargo acknowledging receipt of the RASC bauxite "in apparent good order". (Kaiser Exhibit 6, A.-610)

When the 13 open top hopper cars arrived at Kaiser's plant in Mexico, Missouri, 8 of them were unloaded and found to have contaminants. (A.-124, 137) It was agreed that the other open top railcars would not be unloaded. (A.-573) One of the covered hopper cars contained a white contaminant. (A.-107)

Samples of the contaminants were tested at Kaiser's laboratory in Pleasanton, California. The contaminants found were tripoli, furnace slag, iron ore oxide, limonitic iron, coal, gibbsite and clay. (A.-154, 158, 162) The presence of these contaminants made the RASC bauxite unfit for use by Kaiser. (A.-157, 163)

In a business letter dated April 26, 1976, from Mr. L. B. Marzoni, the Director of Freight Claim Services for the ICG, to Kaiser, Marzoni admitted that: "It is highly likely that contamination originated with one or more railcars." (Kaiser Exhibit 13, A.-618)

The 13 open top hopper cars immediately prior to their transportation of Kaiser's RASC bauxite carried the following cargos:

Car Numbered	Prior Contents	
IC 77193	Limestone	
IC 77213	Iron Ore	
GM&062167	Bauxite Ore	
IC 65850	Bauxite Ore	
IC 76129	Furnace Slag	
IC 65419	Iron Ore	
IC 75316	Ballast Rock	
ICG 332813	Limestone	
IC 66586	Limestone	
ICG 321452	Limestone	
IC 89527	Limestone	
GM&080139	Unknown	(A.-433)

Philipp Brothers did not receive any contamination complaints from the other recipients of the M/V Arrow Cane's cargo of RASC bauxite. (A.-285)

The Carmack Amendment, 49 U.S.C. Section 20(11), establishes the liability of a common carrier for damaged cargo. In *Missouri Pacific Railroad Company* v. *Elmore & Stahl,* 377 U.S. 134, 84 S.Ct. 1142 (1964) this court set forth the requirements for a prima facie case under the Carmack Amendment: (1) The cargo was delivered to the carrier in good condition (this referred to as the "delivery requirement"); (2) The cargo reached its destination in damaged condition; and (3) The extent of damages sustained. Upon establishment of the prima

facie case, the burden shifts to the carrier to demonstrate its freedom from negligence and that the damage resulted from one of the exceptions for which a carrier is not liable. The controversy herein involved is whether Kaiser offered sufficient evidence to satisfy the delivery requirement.

The trial of this action occurred in the United States District Court for the Eastern District of Missouri in March of 1979. At the trial, in an attempt to establish the delivery requirement, Kaiser offered the following evidence: (1) ICG's bill of lading reciting receipt of the bauxite in apparent good order; (2) the admission of ICG's freight claims director that it was highly likely that the contamination originated in one or more railcars; (3) the fact that ICG had no record it had cleaned the railcars that transported the bauxite; (4) cleaning and handling precautions undertaken by the employees of the Alabama State Docks; (5) the clean appearance of the bauxite upon delivery to ICG; and (6) the satisfactory tests conducted on the bauxite at the mining site. Notwithstanding the ICG's failure to present contrary evidence, the District Court held Kaiser had failed to satisfy the delivery requirement. 468 F.Supp. 615 (E.D. Mo. 1979). The United States Court of Appeals for the Eighth Circuit reversed holding Kaiser had established a prima facie case. 615 F.2d 470.

ARGUMENT

I.

It Is Within Authority Of A United States Court Of Appeals To Overturn Factual Findings And Conclusions Of A District Court When The Judgment Is Not Supported By Substantial Evidence.

Petitioner contends the Court of Appeals, by rejecting the factual findings of the District Court, "unjustifiably conducted a denovo review of disputed facts . . ." (Petitioner's brief, p. 18). Federal Rule of Civil Procedure 52(a) governs the authority of an appellate court to disregard factual findings of a lower court. Rule 52 states in part that "factual findings shall not be set aside *unless clearly erroneous.*" (Emphasis added) This unequivocally indicates that an appellate court may redetermine facts if it is left with the definite and firm conviction that a mistake has been made. *Southern Illinois Stone Company* v. *University Engineering Corporation,* 592 F.2d 446 (8th Cir. 1979).

Kaiser presented an unqualified bill of lading, and five additional *uncontroverted* evidentiary facts. The Court of Appeals reversed as "clearly erroneous" the District Court's finding that such evidence was insufficient to satisfy the delivery requirement. The Court of Appeals, pursuant to FRCP 52(a) was acting within its sound discretion and, therefore, this Court should not be burdened with a further review which would test this sound decision of the Court of Appeals for the Eighth Circuit.

II.

The Court Of Appeals' Holding Followed Established Precedents; Therefore, The Only Issue Is Whether Respondent's Evidence Satisfied The "Delivery Requirement". The United States Supreme Court Should Not Be Required To Review The Court of Appeals' Application Of the Uncontroverted Facts To The Established Law.

Petitioner contends the Court of Appeals erred in ignoring precedent, by according the bill of lading's recital too much weight. In support of this contention petitioner cites seven cases in which the delivery requirement was held unsatisfied notwithstanding the fact that the carrier had issued a bill of lading to the shipper. Each can be distinguished from the facts of this case.

Petitioner cites *Hoover Motor Express Co.* v. *United States,* 262 F.2d 832 (6th Cir. 1959), in which the cargo delivered to the carrier was machinery housed in closed wooden crates. Upon receipt of the cargo, the carrier issued a bill of lading stating the cargo was in apparent good order. The bill of lading also stated that the "contents and condition of contents unknown". The Court held the latter clause constituted an "express limitation" on the carrier's liability and, therefore, the recital of "in apparent good order" applied only to the crates and not to the machinery contained therein. In the present case there was no such "express limitation" on petitioner's bill of lading, rather it unequivocally stated the bauxite was in "apparent good order".

Hoover is also distinguishable on a second point. In *Missouri Pacific,* supra, this Court stated:

> "The general rule of common carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge all the facts and circumstances on which it may rely to relieve itself of liability." 377 U.S. 134 (1964).

As stated, in *Hoover* the cargo was housed in closed wooden crates. Hence, absent breaking into the crates, the carrier had no means by which to examine the machinery and, therefore, no means by which to acquire the knowledge which *Missouri Pacific* states is the basis of common carrier liability. In the present case the RASC bauxite was contained in open railway cars and was easily accessible to examination without petitioner's being required to break into a container provided by the shipper. The RASC bauxite was not in a sealed container.

Petitioner cites *Armour Research Foundation of Illinois Institute of Technology* v. *Chicago, Rock Island and Pacific Railroad Co.*, 311 F.2d 493 (7th Cir. 1963); and *Clark* v. *Barnwell*, 53 U.S. 272, 12 How. 272 (1851). In *Armour* the cargo of electronic equipment was delivered to the carrier in a locked van, upon receipt of which the carrier issued a bill of lading which was silent as to the nature and condition of the van's contents. In *Clark* the cargo was delivered to the carrier in closed boxes and the bill of lading included the statement "contents unknown". In both *Armour* and *Clark* the cargo was packaged such that to make an inspection the carrier would have been required to break into a container provided by the shipper. Moreover, in each case the bill of lading, either expressly or impliedly, indicated the carrier's ignorance of the nature and condition of the cargo.

Each remaining case cited by the petitioner in support of its contention involved cargo which was delivered to the carrier under seal or in a closed package; *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 313 F.2d 864 (7th Cir. 1963); *Blue Bird Food Products Co.* v. *Baltimore & Ohio Railroad Co.*, 492 F.2d 1329 (3rd Cir. 1974); *Ed Miniat, Inc.* v. *Baltimore and Ohio Railroad Co.*, 587 F.2d 1277 (D.C. Cir. 1978); *The Niel Maersk*, 91 F.2d 932 (2nd Cir. 1937); or involved a bill of lading which expressly indicated the carrier's ignorance of the nature and condition of the cargo. *Ohio Galvanizing & Manufacturing Company* v. *Southern Pacific Company*, 39 F.2d 840 (6th Cir. 1930).

When, as in the present case, the cargo is not packaged or sealed when delivered to the carrier, the case law has held a bill of lading unqualifiedly stating "in apparent good condition" is prima facie evidence that the cargo was delivered to the carrier in good condition. *Cutten* v. *Allied Van Lines, Inc.*, 514 F.2d 1196 (9th Cir. 1975); *Horn* v. *Cia de Navegacion Fruco*, 404 F.2d 422 (5th Cir. 1968); *Continental Grain Co.* v. *American Commercial Barge Line Co.*, 332 F.2d 26 (7th Cir. 1964); and *Tuschman* v. *Pennsylvania R.R.*, 230 F.2d 787 (3rd Cir. 1956).

The Court of Appeals determined that the District Court had committed a mistake when it rendered a judgment in favor of the ICG. (Pet. App. A-15) The Court of Appeals held that Kaiser had in fact established delivery of the RASC bauxite to the ICG in good condition. It also held that Kaiser had established the remaining two elements required for liability to be imposed upon the common carrier under the Carmack Amendment. The ICG presented no evidence to controvert these facts. In addition, it did not present any evidence to show the damage may have been caused by one of the five recognized exceptions to liability under the Carmack Amendment. These exceptions apply if the damage to the cargo be a direct result of an act of God, or the public enemy, or the act of the shipper, or by the public authority, or due to the inherent vice or nature of the goods. (Pet. App. A-16)

The petitioner's writ for certiorari subtlely requests that this court review the quantum of evidence offered by Kaiser to determine whether it was sufficient to satisfy the "delivery requirement" of the Carmack Amendment. This question of fact has already been carefully reviewed in the well-written opinion of the Court of Appeals for the Eighth Circuit. The decision of the Court of Appeals is sound and corrects a fundamental mistake which was committed by the District Court when it departed from the rules of law established by this Court. The Court of Appeals' decision does not conflict with earlier decisions of this Court and is in line with decisions of other Courts of Appeal. The ICG should not attempt to contaminate its legal cargo by trying to compare cases involving cargos which are sealed and which cannot be inspected with a shipment of RASC bauxite which was available for visible inspection at any time by the railroad. As a matter of fact, ICG's representative almost daily visited the docks. (A.-544) This circumstance coupled with the fact that the railroad admitted it had no record of cleaning the railcars in question, the director of freight claim services for the ICG admitted that contamination could have occurred in

one or more of the railcars, the extreme precautions taken by the employees of the Alabama State Dock to insure the cleanliness of the unloading facilities and the bold admission by the ICG's bill of lading that the RASC bauxite when received by the ICG contained no apparent contaminants leaves room for only one conclusion. Kaiser met its burden of proof and the ICG failed to go forward with the evidence. In light of this, the petition for certiorari should not be granted by the Supreme Court. The statistics cited by petitioner in its brief as to the amount of claims paid, the decline of total amount of revenue indicate the laxness with which the railroads ship their cargo. It does not indicate a basis for the granting of the extraordinary remedy of review by a writ of certiorari.

For the first time in this case, the ICG has resorted to 49 U.S.C. Section 101 in an attempt to escape liability. This statute provides that:

> "When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them . . . or by a statement that the goods are said to be goods of a certain kind or quantity, . . . such statements, if true, shall not make liable the carrier issuing the bill of lading, . . . The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; . . ."

The bill of lading issued by the ICG in this case contains no wording or language which would allow 49 U.S.C. Section 101 to apply. As noted in *Tuschman* v. *Pennsylvania R.R.*, 230 F.2d 787 (3rd Cir. 1956), the ICG's bill of lading is prima facie evidence that the RASC bauxite was uncontaminated at the time it was placed in the railcars.

CONCLUSION

Respondent respectfully submits that the Court of Appeals had the authority to disregard the clearly erroneous findings of the District Court. The decision of the Court of Appeals followed and applied the established precedents announced by this Court in the decision of *Missouri Pacific Railroad Company* v. *Elmore & Stahl,* 377 U.S. 134 (1964). The Court of Appeals' finding that the bill of lading's recital and the five additional pieces of uncontroverted evidence was sufficient to satisfy the delivery requirement involved an application of the uncontroverted facts in this case to the law set forth in the *Missouri Pacific* v. *Elmore & Stahl* decision. The petition for writ of certiorari does not involve a novel question for review by this Court. The petitioner's request should be denied.

Respectfully submitted,

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